In Re the QRC Firm Registration of PAR, Inc. (Professional Associates in Rehabilitation (PAR), Inc., v. Minnesota Dep't of Labor and Indus.)

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 24, 2012

No. WC11-5362

HEADNOTES

REHABILITATION. Where there was a stipulation that the owner of a rehabilitation firm could engage in vocational activity while he was not a qualified rehabilitation consultant (QRC) and that the owner could use the assets of the firm in his separate activities, it was error for the Rehabilitation Review Panel to conclude that all of the activities of the owner were to be attributed to the firm.

REHABILITATION; RULES CONSTRUED - MINN. R. 5220.0100, subp. 29. Where a vocational expert met with an employee and then met with the employee and his doctor to discuss the employee's medical care, it was error for the Rehabilitation Review Panel to conclude that these meetings were part of a program of rehabilitation services under Minn. R. 5220.0100, subp. 29.

REHABILITATION; RULES CONSTRUED - MINN. R. 5220.0100, subp. 29. Where a vocational expert met with an employee and her doctor as an agent of the employee's lawyer to obtain information for the lawyer's assessment of the case, it was error for the Rehabilitation Review Panel to conclude that the expert was providing a program of rehabilitation services under Minn. R. 5220.0100, subp. 29.

REHABILITATION. The rehabilitation rules found in chapter 5220 of Minnesota Rules do not apply to a non-QRC vocational expert who is not providing rehabilitation services.

REHABILITATION. Where the plain language of the rule, the common usage of the term, and the testimony of a witness from the Department of Labor and Industry all demonstrate that the prohibition against fee splitting is meant to apply to referrals between rehabilitation firms, it was error for the Rehabilitation Review Panel to conclude that the liquidated damages provision in a separation agreement was a violation of Minn. R. 5220.1805(G).

Reversed

Determined by: Stofferahn, J., Johnson, J., and Milun, J.
Administrative Law Judge: Eric L. Lipman

Attorneys: Mark A. Karney, Attorney at Law, Minneapolis, MN for the Appellant. Jackson Evans, Office of the Attorney General, St. Paul, MN, for the Respondent.

MAJORITY OPINION

DAVID A. STOFFERAHN, Judge

Professional Associates in Rehabilitation, Inc., appeals from a determination by the Rehabilitation Review Panel that it violated a number of administrative rules and from an assessment of $22,000.00 in penalties. We reverse.

BACKGROUND

In April 2010, the Department of Labor and Industry (DOLI) filed a 19 count complaint against Professional Associates in Rehabilitation (PAR). The complaint was made under the provisions of Minn. Stat. § 176.102, subd. 3a, and Minn. R. 5220.1806, and alleged PAR had violated rules found in chapter 5220 of the Minnesota Rules. An evidentiary hearing was held before an administrative law judge (ALJ) of the Office of Administrative Hearings on December 15 and 17, 2010, and January 6 and 7, 2011. The ALJ served and filed his recommendations on April 6, 2011, and the file was referred to the Rehabilitation Review Panel (Panel) for a final decision. The Panel considered written "exceptions" and oral arguments from the parties to the ALJ's decision. In its decision, served and filed November 10, 2011, the Panel adopted some of the findings and conclusions of the ALJ, but issued its own findings and conclusions on some of the issues. The Panel concluded that nine of the counts in the complaint were established and a fine of $22,000.00 was levied against PAR. PAR has appealed this decision.

John Richardson (Richardson) became a qualified rehabilitation consultant (QRC) in 1986 and started PAR, a qualified rehabilitation consultant firm as defined in Minn. R. 5220.0100, subp. 24, in 1988. In February 2008, Richardson and DOLI resolved a complaint filed against Richardson by DOLI and a civil lawsuit filed against DOLI by Richardson. The stipulation between DOLI and Richardson provided that Richardson would voluntarily withdraw his QRC registration as of April 15, 2008, for a period of two years. The stipulation also provided that Richardson would be allowed to "remain employed by and continue to own" PAR, although a registered QRC was required to be one of the management staff. In addition the stipulation provided that "this agreement does not preclude Respondent (Richardson) from engaging in professional activities that do not require registration as a QRC, including, but not limited to, acting as an expert witness." In addition to his QRC registration, Richardson was also a Certified Rehabilitation Counselor (CRC), registered as such by the Commission of Rehabilitation Counselor Certification (CRCC).[1] The stipulation acknowledged Richardson's status as a CRC. Richardson testified that after his QRC license was surrendered, he never identified himself as a QRC and advised people with whom he dealt on a professional basis that he was a CRC.

Most of DOLI's charges and the Panel's conclusions dealt with interactions between Richardson and two injured workers, KA and CJ.[2] The Panel determined that Richardson had provided statutory rehabilitation services to these injured workers, that certain of his actions violated the rules found in chapter 5220, and that Richardson's actions were attributable to PAR, so that PAR was subject to discipline for those actions. In addition to the allegations based on the conduct of Richardson, the complaint also charged that a non-compete agreement between PAR and a former QRC employee violated the rules in chapter 5220.

KA was an employee of Qwest who had sustained a work injury to his low back in February 2008. KA testified at the ALJ hearing that in early June 2008 he was concerned about his employment and medical situation. KA shared his concerns with a friend at work and the friend suggested that KA contact Richardson, someone with whom the friend had dealt previously. KA called Richardson and they met at a Perkins for coffee on a Saturday morning in early June. KA testified he signed no forms and Richardson took no notes. KA told Richardson that he was worried about the possibility of surgery since his wife had undergone back surgery with poor results. In the course of the conversation, Richardson made some suggestions about possible medical care options.

KA told Richardson that he did not think he was able to discuss this subject with his doctor very well and he asked Richardson to go to his next medical appointment with him.

Richardson accompanied KA to his appointment with his treating doctor, Dr. Michael Schulenberg, on June 11, 2008. KA did not sign an authorization to release medical information but KA was present with Richardson during the conversation with Dr. Schulenberg. Richardson mentioned to the doctor another therapy program called MedX. The doctor and KA met privately after this discussion and Richardson had no further contact with KA after the medical appointment. Dr. Schulenberg referred KA to Physicians Diagnostic and Rehabilitation (PDR) for possible MedX treatment. The appointment at PDR took place on June 23, 2008.

KA hired a lawyer to assist him with his workers' compensation case and the lawyer filed a notice of representation with DOLI on June 24, 2008. The lawyer also contacted PAR and asked them to provide a rehabilitation consultation. Rex Smith, a QRC intern from PAR, met KA for the rehabilitation consultation on June 27, 2008, and a rehabilitation consultation report was subsequently filed by PAR. The insurer for Qwest approved rehabilitation services and KA worked with a QRC from PAR until he settled his workers' compensation case in early 2009.

In the evening of June 23, 2008, Richardson received a phone call from Carla Brunner, an employee of PDR.[3] Richardson testified that Ms. Brunner was upset about a telephone conversation she had with Denise Micale, a nurse from Intracorp, who had called on behalf of Qwest's workers' compensation insurer. According to Richardson, Brunner told him that Micale did not seem to understand the nature and purpose of MedX therapy and had said that she would not approve the therapy. Brunner asked Richardson to call Micale and explain MedX therapy to her. Brunner also told Richardson that PDR was considering filing a complaint against Micale for practicing medicine without a license.

Richardson called Micale, who was in Arizona, at about 6:30 that evening. Micale and Richardson agreed in their testimony that this was a contentious call but disagreed as to some of the details of that conversation. Micale stated that Richardson identified himself as a QRC and that he was insistent and irate. She said that he threatened to take her license and questioned her qualifications. She ended the conversation abruptly because of his behavior. Richardson denied saying that he was a QRC and denied threatening her. He testified that he had relayed to Micale concerns that PDR had about her conduct and also said that he was a CRC.

Micale reported this conversation to the workers' compensation insurer who filed a complaint with DOLI initiating the disciplinary process against PAR taken by DOLI.

Nine of the nineteen counts in DOLI's complaint dealt with Richardson's involvement with KA. The Panel substituted its own conclusions for those of the ALJ and determined that six of those counts were established by DOLI. Count 2 alleged that Richardson, as an agent of PAR, engaged in "adversarial communications" and violated Minn. R. 5220.1801, subp. 9.K., in his telephone conversation with Micale. Count 3 alleged that Richardson, as an agent of PAR, was not "professionally objective" and violated Minn. R. 5220.1801, subp. 4a, when he recommended approval of MedX therapy in his telephone conversation with Micale. Count 4 alleged that Richardson, as an agent of PAR, "disparaged" Micale's qualifications and violated Minn. R. 5220.1801, subp. 10, in his telephone conversation with Micale. Count 5 alleged that Richardson, as an agent of PAR, misrepresented his "level of skill and competency" and violated Minn. R. 5220.1801, subp. 10, in telling Micale he was a QRC. Count 7 alleged that Richardson, as an agent of PAR, engaged in communication with a health care provider without written authorization and violated Minn. R. 5220.1802, subp. 5, when he met with Dr. Schulenberg and KA. Count 9 alleged

that PAR, in allowing Richardson to assist KA in obtaining MedX therapy, was allowing an unqualified person to engage in rehabilitation services in violation of Minn. R. 5220.1801, subp. 9.J.

A number of the allegations in DOLI's complaint dealt with Richardson's interaction with CJ. CJ was an employee of Northwest Airlines who had a work-related upper extremity injury in 2001. In early 2008, she was referred by her union to attorney Roger Poehls and she retained him to represent her in her workers' compensation case in March 2008.

At the time she retained Poehls, CJ was working at Delta Airlines, the successor to Northwest, in her regular job with no wage loss. CJ had been receiving physical therapy for her work injury on an ongoing basis since the injury. Her file at Liberty Mutual, the workers' compensation insurer, had recently been assigned to a new adjuster who had withdrawn authorization for physical therapy on the basis of an IME opinion that the employee's complaints were related to a non work-related condition. Poehls obtained CJ's medical records and referred CJ to PAR for a rehabilitation consultation. Poehls testified that he made such a referral as a matter of course in all of his cases. PAR sent a letter to the employee about the referral on March 13, 2008.

Initially, the meeting between CJ and a QRC from PAR was set to take place at the office of Dr. Janus Butcher, the employee's treating doctor, in Duluth on April 11, 2008. Bad weather on that date forced the cancellation of the appointment and it was rescheduled for April 17.

Sometime during the time between his referral to PAR and April 17, Poehls had telephone conversations with the adjuster at Liberty Mutual regarding CJ's case. Although the adjuster agreed with Poehls that there were questions about whether her treatment was related to the work injury and whether further physical therapy was appropriate, the adjuster refused to pay for a rehabilitation consultation. Poehls advised PAR that the insurer would not pay for a consultation. Richardson testified that in such a situation PAR did not provide a rehabilitation consultation unless there were current medical restrictions from the employee's treating physician. PAR declined to provide a rehabilitation consultation for CJ.

Poehls then contacted Richardson and asked him to go to the appointment CJ had with Dr. Butcher. Poehls' office is in the Twin Cities and he testified that he did not want to travel to Duluth for that appointment. Poehls testified that he wanted Richardson to "tell me what was going on." At the time he made this request, Poehls was aware that Richardson would not be a QRC when he met with CJ and her doctor.

Richardson met with CJ at Dr. Butcher's office on April 17. CJ testified that Richardson made it clear to her that he was not a QRC. She also told Dr. Butcher and his staff that she wanted Richardson to be present during her talk with Dr. Butcher. When Dr. Butcher referred to Richardson as a QRC, CJ corrected him and stated that Richardson was not her QRC. In his chart notes from that date, Dr. Butcher referred to meeting with CJ and her QRC. Richardson sent a letter to Dr. Butcher, with a copy to CJ, stating that he had been acting as a case manager, not a QRC, in the meeting.

After the appointment, Richardson called Poehls to report on the meeting with CJ and the discussion with Dr. Butcher. Richardson billed Poehls for his time and mileage and indicated on the statement that payment should be made directly to Richardson. Richardson had no further contact with CJ after this meeting.

A QRC from PAR conducted a rehabilitation consultation with CJ on September 9, 2008, and a rehabilitation plan was filed with DOLI shortly thereafter. DOLI's actions against PAR

because of Richardson's visit with CJ were initiated by an employee of DOLI who saw a reference to Richardson in CJ's file.

Four of the nineteen counts filed by DOLI dealt with Richardson's involvement with CJ. The Panel found two of those counts to be established. Count 11 alleged that PAR allowed an unauthorized person, Richardson, to "engage in rehabilitation services" in violation of Minn. R. 5220.1801, subp. 9.J., when Richardson met with CJ and her doctor. Count 12 alleged that Richardson, as an agent of PAR, violated Minn. R. 5220.1802, subp. 5, when he met with CJ's doctor without written authorization.

In addition to the allegations against PAR for Richardson's actions, the complaint filed by DOLI dealt with charges against PAR resulting from a non-compete agreement that PAR had with a QRC who had been an employee of PAR and who had left to start his own rehabilitation firm.

Gerard Guzik was a long-time acquaintance of Richardson who was hired by PAR to be a QRC intern in 2006. There were two documents which set out the terms of the employment between Guzik and PAR. One document, titled "Employment Agreement," identified a signing bonus that would be paid to Guzik, the hourly rate he would receive as a QRC intern, a provision for profit sharing, health benefits, and some specifics on his work schedule and the like. The second document, titled "PAR, Inc. Non-compete Agreement," placed limitations on Guzik's contacts with referral sources if he left PAR and also contained a paragraph providing that if Guzik left PAR's employment, he agreed not to take any of PAR's clients with him. If he did so, Guzik agreed to "liquidated damages of $2,000.00, or 50% of fees generated after separation of employment" from his work with those clients.

Guzik became a QRC in January 2008 and about a month later, he left PAR and started his own rehabilitation firm. Another QRC at PAR, Brian Finstad, left PAR at the same time and Guzik and Finstad formed a rehabilitation firm, Integrity Rehabilitation. When Guzik and Finstad left PAR, approximately five of their clients at PAR went with them to their new firm. Guzik testified that he received letters from PAR's attorneys shortly thereafter reminding him of the separation paragraph in the non-compete provision and advising him that they expected him to comply with those terms. PAR also sent a letter to the workers' compensation insurer on one of the files, demanding that PAR be paid one half of the fees to be paid to Guzik's firm.

Shortly thereafter, Guzik and PAR filed competing civil complaints in district court. Guzik sued PAR for amounts he claimed had not been paid as required by the Employment Agreement. PAR sued Guzik for damages as called for in the non-compete agreement. These claims were ultimately settled but during the litigation, Guzik filed a complaint with DOLI against PAR that formed the basis for this part of DOLI's complaint.

The Panel concluded that five of the six counts dealing with the non-compete agreement had not been established but that count 17 had been established. That count alleged that damages language in the separation paragraph of the non-compete agreement was "fee-splitting" and was a violation of Minn. R. 5220.1805(G).

In its complaint, DOLI had also alleged PAR had failed to cooperate with its investigation and had violated Minn. R. 5220.1801, subp. 4. The Panel concluded these allegations had not been established.

STANDARD OF REVIEW

A decision of the Panel imposing discipline on a rehabilitation provider is appealed to this court in the same manner as an appeal from a decision of a compensation judge. Minn. Stat. § 176.102, subd. 3a. On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order (are) clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421. Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). "A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which this court may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993), summarily aff'd (Minn. June 3, 1993).

DECISION

The threshold issue for consideration is the responsibility of PAR for Richardson's actions. Throughout this matter DOLI has argued that all of Richardson's actions in his contacts with KA and CJ must be imputed to PAR so that PAR, as a rehabilitation provider under the rules, was liable for Richardson's actions. The Panel accepted this argument in its decision. The only evidence cited to support PAR's liability is a footnote in the ALJ's recommendations referring to testimony by Poehls that PAR and Richardson were considered one and the same by "everyone" in the workers' compensation field. The Panel's determination on this issue is not supported by substantial evidence.

The Panel failed to give any consideration to the 2008 stipulation between Richardson and DOLI. The stipulation specifically provided that Richardson could continue to own PAR and use its resources and that Richardson could continue to engage in vocational activities that did not require a QRC status. By the stipulation, DOLI recognized that Richardson would engage in vocational rehabilitation activities separately from and independently from PAR. DOLI agreed that Richardson and PAR were not "one and the same" and were separate entities in rehabilitation activity. No evidence was produced that Richardson's actions inured to the benefit of PAR.

We find no basis for imposing liability on PAR. While our conclusion would be dispositive of this case, we are of the opinion that a complete review requires further consideration of the other issues raised by the parties. We turn then to the question of whether Richardson provided rehabilitation services governed by the rules.

The goal of rehabilitation is to restore an injured employee to "an economic status as close as possible to that which the employee would have enjoyed without disability." Minn. Stat. § 176.102, subd. 1(b). A QRC is responsible for developing and implementing a rehabilitation plan to accomplish that goal. Minn. Stat. § 176.102, subd. 4. To be eligible for rehabilitation under the statute, an injured employee must be a qualified employee. A qualified employee is one who is permanently precluded or is likely to be permanently precluded from returning to her or his pre-injury occupation, is not likely to return to suitable employment with the pre-injury employer, and can reasonably expect to return to suitable gainful employment through the provision of rehabilitation services. Minn. R. 5220.0100, subp. 22.

Rehabilitation services are defined as a "program of vocational services, including medical management, designed to return an employee to suitable employment" and may include the "first in-person visit" by the assigned QRC with the employee for a rehabilitation consultation. Minn. R. 5220.0100, subp. 29. A rehabilitation consultation is a meeting between the employee and the assigned QRC to determine if the employee is eligible for rehabilitation services. Minn. R. 5220.0100, subp. 26, and Minn. R. 5220.0130. An insurer "shall" provide a rehabilitation

consultation if a consultation is requested by the employee, employer, or DOLI. Minn. R. 5220.0130, subp. 2. The insurer is required to provide a copy of the first report of injury, the disability status report, and the treating physician's workability report to the assigned QRC before the consultation. Minn. R. 5220.0130, subp. 3.A. After the rehabilitation consultation, the assigned QRC is required to file a report of the consultation with DOLI on a form prescribed by DOLI. Minn. R. 5220.0130, subp. 3.C. and 3.D. If the consultation results in a determination that the employee is qualified for rehabilitation, the QRC prepares a Rehabilitation Plan to be approved by all parties and to be filed with DOLI. Thereafter, rehabilitation services are to be provided by the QRC pursuant to the rehabilitation plan. Minn. R. 5220.0410.

The panel concluded that Richardson's contact with KA was a rehabilitation consultation and, as a result, he was providing rehabilitation services to KA under the rules. The Panel also concluded that Richardson's actions in his contact with KA and Micale had violated the rules found in chapter 5220 of Minnesota Rules and that PAR, as Richardson's employer, was responsible for Richardson's alleged violations of those rules. We consider whether the undisputed evidence supports these legal conclusions by the Panel.

KA contacted Richardson directly on the recommendation of a friend at work who had previously worked with him. KA testified that he was worried about his medical care and about the treatment options that might be available to him. In the meeting at Perkins, KA and Richardson talked about KA's medical care. There was no discussion about whether or not KA should have a QRC, Richardson took no notes, KA signed no forms, and neither KA nor PAR had requested a rehabilitation consultation from the insurer. Richardson went with KA to his doctor and discussed treatment options for KA. There is no evidence that Richardson described himself as a QRC at that appointment. When Dr. Schulenberg referred to Richardson as a QRC in the chart notes from that appointment, Richardson corrected him. Richardson had no further contact with KA.

As noted previously, an employee must be a qualified employee to receive rehabilitation services under the rules. At the hearing, DOLI argued that KA was obviously a qualified employee within the meaning of Minn. R. 5220.0100, subp. 22, at the time of his meeting with Richardson, given the precarious nature of his continued employment with Qwest, and that, as a result, he was entitled to a rehabilitation consultation. The argument is that since KA was entitled to a rehabilitation consultation, the meeting with Richardson should be considered a rehabilitation consultation. We disagree. KA may have been a qualified employee as defined by the rule at the time of his first meeting with Richardson but there is no evidence that the employee, or the employer/insurer, or DOLI were requesting a rehabilitation consultation to determine eligibility for statutory rehabilitation. Neither is there any evidence that KA was seeking vocational rehabilitation assistance from a QRC when he met with Richardson. Instead, KA was seeking information on treatment options available to him and decided to talk to someone familiar with medical treatment for a back injury.

The definition of rehabilitation services as found in Minn. R. 5220.0100, subp. 29, is very broad but it is important to note that it calls for a "program" of vocational rehabilitation designed to return the employee to suitable employment. An employee has the right to seek professional advice about her or his workers' compensation claim, whether from an attorney, a doctor, or a vocational expert. Where, as here, there was no evidence of an interest in statutory rehabilitation until KA met with the QRC from PAR two weeks later, a conclusion that Richardson's contact with KA was the beginning of a program of vocational rehabilitation is not supported by any evidence. We conclude Richardson was not providing rehabilitation services as defined by the rules in his contacts with KA.

The Panel's discipline of PAR for Richardson's telephone call with Micale was based on its determination that, at that time, Richardson was working as KA's QRC and was subject to the rehabilitation rules in chapter 5220. Given our conclusion that Richardson was not providing a program of statutory rehabilitation, we find no basis for disciplining PAR because of the telephone call between Micale and Richardson.

CJ's contact with Richardson came through her attorney, Roger Poehls. Initially, Poehls had asked PAR to provide a rehabilitation consultation for CJ and a meeting was scheduled for April 11, 2008. The meeting was postponed because of adverse weather conditions and rescheduled. In the meantime, the insurer had advised Poehls that it would not pay for a consultation. We have held that in such a situation the QRC may provide rehabilitation services and then make a claim for payment of those services once liability against the insurer is established. Parker v. University of Minn., 64 W.C.D. 134 (W.C.CA. 2003); Najarro v. Minnesota Minerals & Aggregates, Inc., 60 W.C.D. 484 (W.C.C.A. 2009).

However, we did not decide in those cases that a QRC or rehabilitation firm is required to provide services when an insurer refuses to authorize rehabilitation services. A QRC or rehabilitation firm that provides services in that situation runs the risk of not being paid if liability for rehabilitation is not established and may decline to proceed in the absence of the insurer's agreement to pay for those services. Here, PAR, after being advised of the insurer's position, declined to provide a rehabilitation consultation. On appeal, DOLI argues that there is inadequate evidence to support a conclusion that PAR had declined to provide a rehabilitation consultation. We disagree. Both Poehls and Richardson testified that PAR had decided not to provide a rehabilitation consultation to CJ and there is no evidence to the contrary. Both Poehls and Richardson testified that Richardson met with CJ and her doctor as an agent of Poehls to "find out what was going on." Richardson, not PAR, billed for his time in obtaining information for the employee's attorney.

Richardson's primary purpose in meeting with CJ and her doctor was to ascertain for her lawyer whether her ongoing medical treatment was related to her work injury. Every lawyer who is considering whether to represent an injured employee in a workers' compensation case does an assessment of the employee's case and medical care, including whether the care is related to a work injury, whether the care is reasonable and necessary, and whether the employee's medical situation will affect employability. If Poehls had traveled to Duluth to meet with CJ and her doctor or if Poehls had sent a paralegal from his office to do so, it would be apparent that the individual doing so was not providing rehabilitation services. Richardson, acting as an agent of CJ's lawyer in his case assessment, was not providing rehabilitation services when he met with her.

DOLI argues that even if Richardson was not providing rehabilitation services under the statute and rules, he was still subject to those rules based on our holding in In Re the QRC Registration of David Scorse, 56 W.C.D. 18 (W.C.C.A. 1996). Scorse was a QRC providing disability case management services on behalf of the workers' compensation insurer. A complaint was filed against him alleging that in working as a disability case manager he was violating Minn. R. 5220.1801, subp. 8, by failing to keep separate the "roles and functions of a claims agent and a rehabilitation provider." This court discussed the origin of disability case management, the authority for the use of disability case management by employers and insurers, and whether the professional conduct provisions of the rules applied to a QRC acting as a disability case manager.

The Rehabilitation Review Panel had concluded in Scorse that none of the professional conduct rules in chapter 5220 applied when a QRC was providing disability case management services and not statutory rehabilitation. This court vacated that conclusion and held

that some of the professional conduct rules might apply to a QRC acting as a disability case manger but did not address the question further.

Scorse has little application in the present case. Richardson's contacts with KA and CJ do not rise to the level of rehabilitation services as defined by the rule. At most, those contacts could be considered non-statutory services similar to those provided in disability case management. In any event, Scorse applies to a QRC acting as a disability case manager and Richardson was not a QRC at the time of his contacts with KA and CJ. There is no authority for applying the rules in chapter 5220 to an individual who is not a QRC and who is not providing statutory rehabilitation.

In its brief, DOLI argues that discipline is still warranted even if Richardson was not providing statutory rehabilitation because a rehabilitation firm has an obligation to make "full disclosure" that the firm is providing disability case management and PAR did not do so. As authority DOLI cites to a concurring opinion in Scorse in which one member of this court provided "guidance" for QRCs in similar situations. While that opinion might be helpful, an advisory opinion is not precedent and may not serve as a basis for discipline in this case.

Richardson was acting as an agent of KA in his contacts with KA and KA's doctors. He was acting as an agent of the employee's lawyer in his dealings with CJ and her doctor. Richardson was not providing rehabilitation services in those contacts and was not working on behalf of PAR. If the Panel's decision were to be affirmed, a QRC or any person employed by a rehabilitation firm would not be able to meet with an injured employee to discuss employment issues or medical concerns at the request either of the employee or the employee's lawyer. Dealing with the physical and economic consequences of a work injury, navigating one's way through the maze of statutes, rehabilitation rules, medical parameters and doing so without any professional advice is virtually impossible for many injured workers. The efforts of KA and CJ to receive professional advice outside of the system of statutory rehabilitation are simply not within the purview of DOLI. There is no legal basis for penalties against PAR for Richardson's actions.

In addition to the question of Richardson's contacts with KA and CJ, the Panel disciplined PAR for fee splitting. The separation paragraph in the non-compete agreement between Guzik and PAR states that "If any injured worker chooses to continue their professional relationship with a QRC or QRC-I for any reason after separation of employment, PAR, Inc. is entitled to liquidated damages of $2,000, or 50% of fees generated after separation of employment and until the file closes with an R-8." DOLI alleged and the Panel concluded that PAR's attempt to seek damages under this provision was a violation of Minn. R. 5220.1805(G), which states, "A rehabilitation provider shall not incur profit, split fees, or have an ownership interest with another rehabilitation provider outside of the firm that employs the provider."

Fee splitting is not defined in the workers' compensation statute or rules. Black's Law Dictionary defines fee splitting as "the division of attorney fees between the lawyer who handles a matter and the lawyer who referred the matter." Black's Law Dictionary 692 (9th ed. 2009). According to this definition, the usual meaning of fee splitting involves a voluntary business arrangement between two parties in which one party obtained the file and the second party did the work on the file. The two parties divide or split the resulting fee. The usual meaning of fee splitting is the usage supported by the language of Minn. R. 5220.1805(G), which, in addition to prohibiting fee splitting, also prohibits incurring a profit or having an ownership interest in another rehabilitation firm. Both of these are also what might be assumed to be voluntary business arrangements between parties.

At the hearing, DOLI presented the testimony of Phillip Moosbrugger, an employee of DOLI who had conducted the investigation of Richardson and PAR. Moosbrugger stated that

there were two "potential evils" in fee splitting. First, there was the potential confusion of an injured employee in a referral situation where it might appear unclear to the employee as to which QRC was actually providing services. Second, a referral fee would reduce the amount the QRC actually performing rehabilitations services would receive, and since there is a cap on the hourly fee the QRC can charge an insurer, the QRC might not be adequately compensated for the services provided. (12/17/10 Hearing, T. 28-29.) Both of these "potential evils" deal with the referral of a case by a rehabilitation firm obtaining the client to a rehabilitation firm doing the actual work. The concerns stated by DOLI do not exist in the present situation, a legal claim made against an ex-employee. An R-3 was filed with DOLI by Guzik, changing the assigned QRC from PAR to himself. All parties were aware of the identity of the QRC. The second purpose does not exist because the intent of the damages provision would be to reduce the economic incentive for Guzik to violate the separation agreement.

The plain language of Minn. R. 5220.1805(G), the ordinary meaning and usage of fee splitting, and the reasons for the rule as enunciated by DOLI's witness at the ALJ hearing demonstrate that PAR's efforts to obtain damages for Guzick's alleged breach of the separation agreement was not an agreement to split fees and was not a violation of the rules.

DOLI contends it has interpreted this rule so as to prohibit PAR's actions and this court must give deference to its interpretation of the rule. As the decision cited by DOLI indicates, deference is to be given to an agency's findings because of the agency's "expertise and its special knowledge in the field of its technical training and experience." Fine v. Bernstein, 726 N.W.2d 137, 142 (Minn. App. 2007). However, the meaning of words in a regulation is a question of law to be reviewed *de novo.* If the plain meaning of the regulation is clear, no deference need be given to the agency interpretation. In Re Rate Appeal, 728 N.W.2d 497, 503 (Minn. 2007). Further, words and phrases are construed "'according to their common and approved usage.' Minn. Stat. § 645.08 (2010). When considering the plain and ordinary meaning of words or phrases, we have consulted dictionary definitions. We also construe rules 'as a whole' and 'words and sentences are understood . . . in the light of their context.'" Troyer v. Vertlu Mgmt. & Lundberg Funeral, 806 N.W.2d 17, 24 (Minn. 2011) (citations omitted).[4]

We find no ambiguity in the common usage and understanding of the phrase "fee splitting" and conclude it can not be construed to refer to the liquidated damages clause in a non-compete agreement. Non-compete agreements are valid under Minnesota law if they are bargained for and are supported by adequate compensation. National Recruiters, Inc. v. Cashman, 323 N.W.2d 735 (Minn. 1980); Kallock v. Medtronics, Inc., 573 N.W.2d 356 (Minn. 1998). We find no provision in the workers' compensation statute or rules that prohibit the use of a non-compete agreement between a rehabilitation firm and a QRC employee. DOLI asks this court to affirm a penalty against PAR of $3,000.00 for the "fee splitting." Before a party is penalized for violating a rule when its actions are otherwise allowable under Minnesota law, the rule alleged to have been violated must be clearer in its application than is the one at issue here.

The decision of the Rehabilitation Review Panel is reversed.

SEPARATE OPINION
(Concurring in Part and Dissenting in Part)

PATRICIA J. MILUN, Judge

This case presents several issues on appeal from a determination by the Rehabilitation Review Panel that PAR and the firm's sole owner, John Richardson, operated the business and managed the employees out of compliance with Minn. R. ch. 5220. I concur with the majority's reversal of the Panel's determination that John Richardson was providing rehabilitation services to KA and CJ as defined in Minn. R. ch. 5220. However, as to the majority's conclusion that the liquidated damage provision of the non-compete agreement did not violate the provisions of Minn. R. 5220.1805(G), I disagree. I find the voluntary business arrangement documented in the non-compete agreement clearly did violate Minn. R. 5220.1805(G) by mandating the rehabilitation providers to split fees when certain conditions are met. I would affirm the Panel as to their findings on the non-compete agreement under the plain meaning of the rule in accordance with Minn. Stat. § 645.08.

Interpretation of the language and structure of Minn. R. 5220.1805(G) is a question of law. Minn. R. 5220.1805(G) states "A rehabilitation provider shall not . . . split fees . . . with another rehabilitation provider outside of the firm that employs the provider." Despite the extensive analysis of the majority, I consider the issue plainly resolved when one looks at the language of the non-compete agreement and the facts in this case.

As the majority notes, Gerard Guzik, a rehabilitation provider, entered into a voluntary business arrangement with John W. Richardson/PAR, Inc., another rehabilitation provider, regarding QRC fees. The agreement states if Mr. Guzik leaves PAR he must pay "$2000, **or** 50% of fees generated"[5] for each client he takes with him. In essence, two QRC providers agreed to voluntarily split fees if certain conditions were met. I believe we need look no further than the agreement. The simple language of the unambiguous rule has been met. The agreement violates the clear substantive prohibition against fee splitting enforceable by the Minnesota Department of Labor and Industry. We do not need to go into further analysis on whether this type of fee splitting is like attorney fee splitting or referral fees. The rule does not make such a distinction. In my opinion, to come to the majority's conclusion the rule would have to state: *A rehabilitation provider shall not split fees with another rehabilitation provider outside of the firm that employs the provider* ***except for fee splitting arrangements regarding non-compete agreements***. Since the Minnesota Department of Labor and Industry did not write such an exception to the rule, I must defer to the interpretation and findings of the Rehabilitation Review Panel on this issue. The Panel's interpretation is consistent with the rule; I would affirm.

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[1] Certification as a CRC by the CRCC or certification as a certified disability management specialist by the Certification of Disability Management Specialists Commission is required to become a QRC. Minn. R. 5220.1400.

[2] Since this matter does not involve KA and CJ, other than in their interactions with Richardson, their full names will not be used in this decision.

[3] Ms. Brunner was employed in PDR's administrative office and contacted workers' compensation insurers for approval of treatment. She did not testify at the ALJ hearing.

[4] We also question whether the admonition of the court in Fine applies in the present situation. This court is also an executive agency whose members are to "have experience with and knowledge of workers' compensation and the workers' compensation laws of Minnesota." Minn. Stat. § 175A.01, subd. 3. This court is to be the "sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under the workers' compensation laws of

the state that have been appealed to the Workers' Compensation Court of Appeals." Minn. Stat. § 175A.01, subd. 5.

[5] Emphasis added.

OAH 8-1900-21251-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRTIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the QRC Firm Registration of PAR, Incorporated

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

This matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing on December 15 and 17, 2010 and January 6 and 7, 2011.

Earlier, in April of 2010, the Department of Labor and Industry filed a 19-count complaint against Professional Associates of Rehabilitation, Inc. (PAR). The complaint asserted that PAR's business and client service practices violated various provisions of Minnesota Rules Chapter 5220.

Following the receipt of post-hearing submissions, the hearing record closed on March 7, 2011.

Jackson Evans, Assistant Attorney General, appeared on behalf of the Department. Mark A. Karney, Attorney at Law, appeared on behalf of Respondent Professional Associates of Rehabilitation, Inc.

STATEMENT OF ISSUES

The issues presented in this case are as follows:

1. Is John Richardson's conduct attributable to PAR for purposes of discipline of PAR's Rehabilitation Firm registration?

2. Was John Richardson's conduct in serving clients K.A. and C.J. inconsistent with the requirements of PAR's registration as a Rehabilitation Firm?

3. Did PAR's employment agreements with Brian Finstead and Gerald Guzik violate the prohibitions on fee-splitting by Qualified Rehabilitation Consultants?

4. Did PAR's employment agreements with Brian Finstead and Gerald Guzik violate the rights of client-employees to choose a qualified rehabilitation consultant, under Minn. Stat. 176.102, subd. 4?

5. Did PAR violate its duty to cooperate with the Department's investigation of misconduct?

The Administrative Law Judge concludes that the conduct of PAR's owner, John Richardson, is properly attributable to PAR, and that his conduct while serving C.J. and K.A. was inconsistent with PAR's role as a Rehabilitation Firm. Additionally, the Administrative Law Judge concludes that while PAR's employment agreements with Brian Finstead and Gerald Guzik violated the prohibition on fee-splitting among Qualified Rehabilitation Consultants, the arrangements did not deprive any client-employees of the opportunity to freely choose a rehabilitation provider. Lastly, the Administrative Law Judge concludes that the Department did not establish that PAR failed to cooperate with its investigation.

Based upon the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Practice Among Minnesota Rehabilitation Providers

1. Rehabilitation providers are registered under Minn. Stat. § 176.102 (2010). The statute recognizes three types of rehabilitation providers: a Qualified Rehabilitation Consultant (QRC), a QRC firm, and a registered rehabilitation vendor.[1]

2. A QRC is a professional who provides vocational rehabilitation services to injured employees in the state of Minnesota. The role of the rehabilitation provider is to provide vocational guidance and related assistance so as to restore an employee to suitable gainful employment.[2]

3. A "rehabilitation firm" is a legal entity that employs Qualified Rehabilitation Consultants.[3]

4. While other states have licensing regimens that are similar to Minnesota's rules for rehabilitation providers, the term "Qualified Rehabilitation Consultant" only has regulatory significance in Minnesota.[4]

5. Employees who are eligible to receive rehabilitation services from rehabilitation providers are referred to as "Qualified Employees." Minn. R. 5220.0100, subp. 22 defines "qualified employee" as:

> [A]n employee who, because of the effects of a work-related injury or disease, whether or not combined with the effects of a prior injury or disability:

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[1] Minn. Stat. § 176.102; Minn. R. 5220.0100, subp. 28; Testimony of Philip Moosbrugger, Vol. 1, at 130.

[2] Test. of P. Moosbrugger, Vol. 1, at 131-32.

[3] *Id.*

[4] *Id*; *see also* Minn. Stat. § 176.102.

A. is permanently precluded or is likely to be permanently precluded from engaging in the employee's usual and customary occupation or from engaging in the job the employee held at the time of injury;

B. cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and

C. can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician's opinion of the employee's work ability."[5]

6. Typically, rehabilitation providers begin their service for clients following a request for an initial consultation – either directly from the employee or from someone acting on the employee's behalf. An initial consultation may be requested by the employee, the employer, or the Department.[6]

7. Likewise important, consultations by rehabilitation providers can either be consented to by the insurer – in cases in which there is an agreement on the payment for such services – or not consented to by the insurer. In the latter circumstance, a rehabilitation provider who does provide services to an injured worker that is later determined to be a "qualified employee," may receive a monetary award for those services from a compensation judge. Many rehabilitation providers do provide services to injured workers without an agreement to be compensated by an insurer, believing that they will later win payment for those services as part of an award in a workers compensation case.[7]

8. Ordinarily, an initial consultation is the first in-person meeting between the employee and a rehabilitation provider. The initial consultation permits the rehabilitation provider to gather information, determine whether the employee is a qualified employee and whether the employee would benefit from the services of a Qualified Rehabilitation Consultant.[8]

9. Under Minn. R. 5220.0130, subp. 3 (D), the rehabilitation provider is required to file a rehabilitation consultation report within 14 calendar days of the rehabilitation consultation. This report must include a "determination of whether or not

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[5] Minn. R. 5220.0100, subp. 22; Testimony of Gerald Guzik, Vol. 2, at 163.

[6] Minn. R. 5220.0130, subp. 2; Test. of G. Guzik, Vol. 2, at 138-39.

[7] Test. of P. Moosbrugger, Vol. 4, at 22-24; Test of G. Guzik, Vol. 2, at 133-40; Testimony of Marsha Ellingson, Vol. 3 at 87-89.

[8] *See,* Minn. R. 5220.0130, subp. 3; Test. of P. Moosbrugger, Vol. 1, at 137; Test. of G. Guzik Test., Vol. 2, at 141-42.

the employee is a qualified employee for rehabilitation services and a narrative report explaining the basis for the determination."[9]

10. Only a registered Qualified Rehabilitation Consultant is permitted to perform an initial consultation in Minnesota.[10]

11. From the Department's perspective, independence and professional distance between rehabilitation providers and the parties to a workers compensation dispute are important objectives of the rules in Chapter 5220. Because of the influential role that such providers play in guiding treatment and rehabilitation plans, the Department insists upon neutrality among rehabilitation providers.[11]

PAR's Founding and Operations

12. John Richardson is a 1986 graduate of the University of Minnesota and holds a bachelors of science degree in psychology.[12]

13. Mr. Richardson first obtained his QRC registration in 1986.[13]

14. Mr. Richardson began his professional work in the field of rehabilitation as a QRC intern for Marsha Ellingson.[14]

15. In 1988, Mr. Richardson established the rehabilitation firm PAR Inc., and is the firm's sole owner.[15]

16. PAR's principal work is in providing services to those persons undergoing statutory rehabilitation under Minnesota Statutes, Chapter 176.[16]

17. For a time, PAR employed 26 employees – 12 of these as Qualified Rehabilitation Consultants.[17]

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[9] Minn. R. 5220.0130, subp. 3 (C)(4) and (D).

[10] Test. of P. Moosbrugger, Vol. 1, at 137; Test. of G. Guzik, Vol. 2, at 141; Testimony of John Richardson, Vol. 2, at 188.

[11] Test. of G. Guzik, Vol. 2, at 161-63; Test. of P. Moosbrugger, Vol. 1, at 133-35; Testimony of Denise Micale, Vol. 2, at 112; *compare generally,* Minn. R. 5220.1801, subp. 4a ("Good faith disputes may arise among parties about rehabilitation services or about the direction of a rehabilitation plan. A rehabilitation provider shall remain professionally objective in conduct and in recommendations on all cases").

[12] Test. of J. Richardson, Vol. 2, at 180.

[13] *Id.,* at 181.

[14] *Id.*

[15] *Id.*

[16] *Id.,* at 182.

[17] *Id.,* at 181-82.

18. As part of its business operations, PAR provides Mr. Richardson a salary, performance bonuses, health insurance, office space and equipment – including a cellular phone.[18]

19. In the years since he obtained his QRC registration, Mr. Richardson has been targeted for regulatory discipline on several occasions. Many of these complaints related to the claimed failure of Mr. Richardson to maintain respectful and appropriate professional boundaries – and were resolved by Mr. Richardson submitting a written apology for his behavior to the person who submitted the complaint.[19]

20. As part of the settlement of an action by the Department in 2008, Mr. Richardson voluntarily surrendered his QRC registration. Under the agreement, Mr. Richardson could continue to participate in the management of PAR, but could not undertake functions requiring a QRC registration. Further, PAR was still bound by the professional obligations of Chapter 5220. The agreement provided:

> While Respondent is not registered as a QRC, he may remain employed by and continue to own Professional Associates of Rehabilitation, but he shall retain another individual, who is currently registered as a QRC, to act as one of the management staff, as required by Minn. R. 5220.1600, subp. 1. The Commissioner acknowledges that this agreement does not prohibit Respondent from participating in the business management functions of the firm. Upon the Department's request, Respondent shall provide information demonstrating compliance with this provision.
>
> While Respondent's QRC registration is withdrawn, he acknowledges that the law prohibits him from acting as a supervising QRC for any QRC intern If Respondent reregisters as a QRC, he specifically acknowledges and agrees that he will not act as a supervising QRC for live, calendar years after the date of the renewal of his registration.
>
> The Commissioner acknowledges that this agreement does not preclude Respondent from engaging in professional activities that do not require registration as a QRC, including, but not limited to, acting as an expert witness.
>
> Respondent reaffirms his commitment, as well as the commitment of his firm, Professional Associates of Rehabilitation, Inc., to comply with Minn. Stat. § 176.102 and Minn. R. Ch. 5220, including, but not limited to, the rules identified in paragraph 2 above.[20]

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[18] *Id.,* at 206, 236 and 258.

[19] Ex. 47.

[20] Ex. 101 (Emphasis added).

The Services Delivered to C.J.

21. In the Spring of 2008, following a presentation that he had given on workers compensation law, Roger Poehls was approached by C.J., an employee of Northwest Airlines. The two briefly discussed C.J.'s case and Poehls agreed to undertake representation of C.J.[21]

22. Because C.J. had worked with other lawyers and providers in the past, and she had a number of medical records associated with her claims, Poehls was eager for an assessment from a rehabilitation provider. Yet, Liberty Mutual, the insurer for C.J.'s employer, declined to authorize (and pay for) such a consultation.[22]

23. Deciding to commission, and pay for, such an assessment, Mr. Poehls faxed a letter to PAR requesting an initial consultation in the C.J. case. Poehls sent this letter on March 13, 2008.[23]

24. Poehls wanted someone from PAR to attend an upcoming medical appointment that C.J. had scheduled with her physician, Dr. Janus Butcher. Poehls was eager for some assistance in assessing C.J.'s condition, treatment history and potential claims.[24]

25. Following the receipt of the letter from Poehls by facsimile, PAR's managing QRC, Leon Olson, wrote a letter to C.J. The letter identified C.J. as "a potential client of PAR, Inc." and advised that C.J. could contact John Richardson regarding "potential services that may be available to you."[25]

26. Further, and also on March 13, 2008, PAR wrote to C.J.'s insurance company to request authorization for rehabilitation services.[26]

27. In early April of 2008, C.J.'s insurance company declined to authorize rehabilitation services. Notwithstanding the lack of authorization, PAR decided that it would provide such services and submit a claim for reimbursement as part for these services as part of the workers compensation process. A QRC employee of PAR, Michelle Pohmer, decided to perform an initial consultation of C.J. at Dr. Buther's office on April 11, 2008.[27]

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[21] Testimony of Roger Poehls, Vol. 3, at 29.

[22] *Id.,* at 29-33.

[23] Exs. 26 and 28.

[24] Test. of R. Poehls, Vol. 3, at 35-38.

[25] Ex. 27.

[26] Ex. 28; Test. of R. Poehls, Vol. 3, at 35 and 48; *see also,* Ex. 119.

[27] Exs. 28, 119 and 126 at 46-47.

28. On April 11, 2008, inclement weather forced Dr. Butcher's office to close and C.J.'s appointment was cancelled.[28]

29. Under his settlement agreement with the Department, John Richardson's last day as a registered QRC was April 15, 2008.[29]

30. On April 16, 2008, C.J. telephoned Ms. Pohmer to inform her that the appointment with Dr. Butcher had been re-scheduled to the following day. Ms. Pohmer returned C.J.'s call and left a message stating that Mr. Richardson would be attending the appointment with Dr. Butcher.[30]

31. Mr. Richardson met C.J. for the first time on April 17, 2008, when he observed C.J.'s appointment with Dr. Butcher.[31]

32. During the appointment, Mr. Richardson conferred with Dr. Butcher as to features of C.J.'s condition.[32]

33. As of April 16, 2008, Mr. Richardson had not obtained written consent from C.J. to engage in communications with her health care providers.[33]

34. Following the appointment, Mr. Richardson wrote to Dr. Butcher. In this letter he detailed the vocational rehabilitation and job modifications that he thought were appropriate to C.J.'s circumstances.[34]

35. Additionally, Richardson sent an invoice to Mr. Poehls for his time and services. The invoice was printed on PAR letterhead and yet directed to the recipient to remit payment to John Richardson.[35]

The Services Delivered to K.A.

36. K.A. was a network technician with Qwest, Inc. from April 2000 until March of 2009. As part of his duties, he would install, maintain and repair telephone lines and equipment in Minnesota.[36]

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[28] Ex. 28.

[29] Ex. 101.

[30] Ex. 28; Test. of J. Richardson, Vol. 2, at 245-46.

[31] Test. of J. Richardson, Vol. 2, at 247.

[32] *Id.,* at 248-49; Ex. 115.

[33] Ex. 33; Test. of J. Richardson, Vol. 2, at 248.

[34] Ex. 116; *compare also,* Minn. R. 5220.0100, subp. 29.

[35] Ex. 115

[36] Testimony of K.A., Vol. 1, at 36-37.

37. On February 22, 2008, while undertaking his duties as a technician, K.A. injured his lower back.[37]

38. Following his injury, and consistent with the restrictions placed on these duties by K.A.'s physician, K.A. was reassigned to various light duties.[38]

39. Qwest's policy is to only offer light duty assignments to its technicians for a limited time. After a field technician is on light duty for 180 days, the technician is granted another 80 days to find a new permanent job within the company. If the technician does not find a suitable position within that time period, the employee is terminated.[39]

40. Increasingly anxious about his ability to return to work as a network technician, as he hoped, K.A. contacted Mr. Richardson of PAR. K.A. was referred to Mr. Richardson by a fellow Qwest employee.[40]

41. K.A. and Mr. Richardson met for breakfast in early June of 2008. The two discussed K.A.'s condition, limitations and treatment progress. Additionally, Mr. Richardson reviewed K.A.'s records.[41]

42. On June 11, 2008, Richardson attended K.A.'s appointment with Dr. Schulenberg. During this appointment, Richardson recommended a course of treatment known as the MedX program offered by the Physicians Diagnostics and Rehabilitation group (PDR). Concurring, Dr. Schulenberg later referred K.A. for treatment at PDR.[42]

43. As of June 11, 2008, Mr. Richardson had not obtained written consent from K.A. to engage in communications with his health care providers.[43]

44. As he left K.A. at Dr. Schulenberg's office, Mr. Richardson gave K.A. his PAR business card. Richardson told K.A. that if there were additional rehabilitation services needed, K.A. should be sure to contact him.[44]

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[37] *Id.*, at 37-38.

[38] *Id.*, at 39-40.

[39] *Id.*, at 44-46.

[40] *Id.*, at 45-47.

[41] *Id.*, at 47, 48, 62 and 85; Test. of J. Richardson, Vol. 2, at 197, 199, 258, 259 and 260; Exs. 18 and 19.

[42] Ex. 107; Test. of K.A., Vol. 1, at 66; Test. of J. Richardson, Vol. 2, at 260-61.

[43] Ex. 13.

[44] Test. of J. Richardson, Vol. 2, at 205, 257 and 260.

45. On June 21, 2008, K.A. completed a written request for a rehabilitation consultation from PAR.[45]

46. Qwest's insurer did not immediately authorize K.A.'s participation in the Med-Ex program. Instead, it advised PDR that it wanted to its own physician to review the features of the program.[46]

47. On June 23, 2008, Carla Bruner, an employee of PDR, telephoned Mr. Richardson and urged him to speak with the insurer regarding its concerns. Bruner was eager to obtain the authorization for services to K.A.[47]

48. Following Ms. Bruner's call, Richardson telephoned Denise Micale, a clinical nurse manager employed by Intracorp. In 2008, Intracorp provided disability case management services for injured Qwest employees in Arizona, Colorado and Minnesota.[48]

49. At the start of the conversation, Mr. Richardson identified himself as K.A.'s "QRC" – an acronym that, at the time, was unfamiliar to Ms. Micale. As the two discussed the particulars of the treatment recommendation for K.A., the exchange between the two became tense and sharp. Frustrated with the lack of authorization and apparent understanding of the program, Mr. Richardson was hostile and disparaging to Ms. Micale during this call.[49]

50. On June 27, 2008, PAR conducted an initial consultation for K.A.[50]

51. On July 2, 2008, PAR's managing QRC, Leon Olson, determined that K.A. was a qualified employee who was in need of statutory rehabilitation services. There were no significant changes in K.A.'s medical condition or employment situation between mid-June 2008 and the end of June 2008.[51]

52. Intracorp later authorized the rehabilitation services provided to K.A. by PAR. PAR billed $5,650.16 for rehabilitation services provided to K.A.[52]

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[45] Ex. 9.

[46] Test. of D. Micale, Vol. 2, at 83-85; Ex. 43.

[47] Test. of J. Richardson, Vol. 2, at 209-11.

[48] Test. of D. Micale, Vol. 2, at 81 and 85-86; Exs. 20 and 43.

[49] Test. of D. Micale, Vol. 2, at 86-90.

[50] Ex. 5.

[51] Exs. 6 and 13; Test. of K.A., Vol. 1, at 88-91.

[52] Ex. 10.

PAR's Non-Competition Agreements with its QRC Interns

53. In 2006, PAR had employment agreements with two QRC Interns – Brian Finstead and Gerald Guzik.[53]

54. The agreements provided in part:

> As a QRC, or QRC-I you agree that you will not solicit, or attempt to leave the company with clients irrespective of the reason for separation of employment. You acknowledge that all clients are the proprietary property of PAR, Inc. and that you will not take or maintain any records related to clients other than those authorized by PAR, Inc. Upon separation of employment all records including names, phone numbers, medical information, etc. will be returned to PAR, Inc.
>
> If any injured worker chooses to continue their professional relationship with a QRC, or QRC—I for any reason after separation of employment PAR, Inc. is entitled to liquidated damages of $2000.00, or 50% of fees generated after separation of employment and until the file closes with an R-8. Absent agreement PAR, Inc. will maintain the right to determine which method of reimbursement is appropriate under the circumstances of each case.
>
> Each QRC, and QRC-I agrees that for a period of one (1) year they will not contact any referral sources of PAR, Inc. All attorneys that refer cases to PAR, Inc. during the year preceding separation of employment will be considered referral sources.[54]

55. In 2008, within one month of Gerald Guzik obtaining registration as a QRC, he and Mr. Finstead started their own firm – Integrity Rehabilitation, LLC. Among the clients of the new firm were five persons whom Guzik and Finstead had worked with while employed as QRC Interns for PAR. One of these clients has an "open file," with matters that are still to be finally resolved with the employer and insurer.[55]

56. In one instance, PAR sent demand letters to the insurer in a matter where a former client of PAR was receiving rehabilitation services from Integrity Rehabilitation, LLC. The letters demanded that the fees remitted to Integrity Rehabilitation be jointly payable to both firms.[56]

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[53] Exs. 37-38.

[54] *Id* (emphasis added).

[55] Ex. 36; Test. of G. Guzik, Vol. 2, at 130, 132 and 159.

[56] Ex. 39.

57. Litigation ensued between the two firms; claims that were settled in advance of a trial.[57]

The Department's Investigation of PAR's Business Practices

58. Prompted in part by claims of misconduct involving Mr. Richardson, the Department undertook an investigation of PAR's business practices in August of 2008.[58]

59. As part of its inquiries, the Department requested that PAR produce all documents relating to the services it provided to K.A. and C.J.[59]

60. As part of its initial disclosure to the Department in response to its request for documents, PAR did not produce:

(a) a completed "initial interview form" associated with K.A.;

(b) a completed "initial interview form" associated with C.J.; or,

(c) the invoice for services to Robert Wilson & Associates.[60]

61. The initial interview form associated with C.J. and the invoice for services to Robert Wilson & Associates, were later disclosed by PAR to the Department.[61]

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

I. Jurisdiction

1. The Administrative Law Judge and the Rehabilitation Review Panel have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 176.102.

2. The Department has complied with all substantive and procedural requirements of law and rule.

3. PAR is "rehabilitation provider" as those terms are used in Minn. R. 5220.0100, subp. 28.

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[57] Exs. 44, 45,123 and124; Test. of G. Guzik, Vol. 2, at 153-57.

[58] Test. of P. Moosbrugger, Vol. 1, at 138-55; Ex. 34.

[59] Test. of P. Moosbrugger, Vol. 1, at 150-55; *compare generally,* Minn. R. 5220.1806, subp 4.

[60] Exs. 31, 32 and 115; Test. of P. Moosbrugger, Vol. 1, at 155-58.

[61] *Id.*

4. The professional conduct of PAR's owner and employee, John Richardson, is attributable to PAR. PAR's rehabilitation firm registration is properly subject to regulatory discipline on account of any misconduct by Mr. Richardson.[62]

II. The Regulatory Implications of the Services Provided to C.J. and K.A.

A. Status as a Qualified Employee

5. An "agent of a rehabilitation provider" may only engage "in those activities designated in Minnesota Statutes, section 176.102, and rules adopted thereunder."[63]

6. In April of 2008, C.J. was an employee who was likely to be permanently precluded from engaging in her usual and customary occupation or from engaging in the job the employee held at the time of injury. Accordingly, she was a "qualified employee" as those terms are used in Minn. R. 5220.0100, subp. 22.

7. Because C.J. was a "qualified employee," it was improper for PAR to permit its resources to be used to provide services that did not conform to the standards of Minn. R. Chapter 5220.

8. In June of 2008, K.A. was an employee who was likely to be permanently precluded from engaging in his usual and customary occupation or from engaging in the job the employee held at the time of injury. Accordingly, he was a "qualified employee" as those terms are used in Minn. R. 5220.0100, subp. 22.

9. Because K.A. was a "qualified employee," it was improper for PAR to permit its resources to be used to provide services that did not conform to the standards of Minn. R. Chapter 5220.

B. Professional Objectivity

10. Minn. R. 5220.1801, subp. 4a requires rehabilitation providers to "remain professionally objective in conduct and in recommendations on all cases."

11. John Richardson, an employee and owner of PAR, did not remain professionally objective when recommending Intracorp's authorization of the MedX program for K.A.

C. Obtaining Written Consent

12. Minn. R. 5220.1801, subp. 5, prohibits a rehabilitation provider from engaging in communications with health care providers about an employee "without the written consent of the employee."

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[62] *See,* Memorandum, Section I.

[63] Minn. R. 5220.1801, subp. 8; *see also,* Minn. Stat. §§ 176.102 and 176.83, subd. 2.

13. John Richardson engaged in communications with health care providers for C.J. without first having obtained the written consent from C.J. for those communications.

14. John Richardson engaged in communications with health care providers for K.A. without first having obtained the written consent from K.A. for those communications.

D. Advocacy on Claims or Entitlement

15. Minn. R. 5220.1801, subp. 8, bars a "qualified rehabilitation consultant, qualified rehabilitation consultant intern, or registered rehabilitation vendor" from acting as an advocate for, or advising any party about, a claims or entitlement issue.

16. While John Richardson did advise a party about a claims or entitlement issue in late April of 2008, neither he nor PAR was a "qualified rehabilitation consultant, qualified rehabilitation consultant intern, or registered rehabilitation vendor," as those terms are used in Minn. R. 5220.1801, subp. 8.

E. Providing Rehabilitation Services

17. Minn. R. 5220.1801, subp. 9 (J), prohibits rehabilitation providers from "knowingly aiding, assisting, advising, or allowing an unqualified person to engage in providing rehabilitation services."

18. Further, Minn. R. 5220.0100, subp. 29, defines "rehabilitation services" as a "program of vocational rehabilitation, including medical management, designed to return an individual to work consistent with Minnesota Statutes, section 176.102, subdivision 1, paragraph (b)." This regulation provides further that

> services under this program may include, but are not limited to, vocational evaluation, counseling, job analysis, job modification, job development, job placement, labor market survey, vocational testing, transferable skills analysis, work adjustment, job seeking skills training, on-the-job training, and retraining.

19. John Richardson's work in discussing C.J.'s condition with her physician, and remitting his rehabilitation and job modification recommendations to Dr. Butcher, on PAR letterhead, amounts to "rehabilitation services" as those terms are used in Minn. R. 5220.0100, subp. 29.

20. John Richardson's work in recommending and facilitating K.A.'s enrollment in the MedX program amounts to "rehabilitation services" as those terms are used in Minn. R. 5220.0100, subp. 29.

21. Because John Richardson had surrendered his Qualified Rehabilitation Consultant certification at the time he rendered services to K.A., PAR is properly subject to regulatory discipline for permitting an unqualified person to provide rehabilitation services.

F. Adversarial Communications

22. Minn. R. 5220.1801, subp. 9 (K) prohibits rehabilitation providers from "engaging in adversarial communication or activity ...." For purposes of this regulation, the term adversarial communication includes "misrepresentation of any fact or information about rehabilitation ...."

23. Mr. Richardson, an agent of PAR, engaged in adversarial communications when he misrepresented the status of his QRC registration to Denise Micale. This misrepresentation was material to obtaining rehabilitation services for K.A.

24. The misrepresentation was closely related to obtaining a good result for K.A. and, for PAR, winning K.A. as a rehabilitation services client.

G. Maintaining Proper Accreditation

25. Minn. R. 5220.1801, subp. 10, requires rehabilitation providers to "limit themselves to the performance of only those services for which they have the education, experience and qualifications."

26. PAR is properly subject to regulatory discipline for permitting John Richardson to provide rehabilitation services to K.A. after the time that Richardson had surrendered his Qualified Rehabilitation Consultant certification.

H. Maintaining Accuracy in Disclosures

27. Minn. R. 5220.1801, subp. 10, requires that rehabilitation providers "accurately represent their level of skill and competency to the department, the public, and colleagues."

28. PAR is properly subject to regulatory discipline for John Richardson's misrepresentation of the status of his QRC registration to Denise Micale.

III. Provisions of the PAR Employment Agreements

29. Minn. R. 5220.1801, subp. 1, restricts involvement in employee's rehabilitation plan, in all but limited circumstances, that are not applicable here, to "the assigned qualified rehabilitation consultant ...."

30. Minn. R. 5220.0710, subp. 1, further provides that injured workers have the right to "choose a qualified rehabilitation consultant as defined in part 5220.0100,

subp. 23, once at any time in the period beginning before the rehabilitation consultation and ending 60 days after filing of the rehabilitation plan."

31. The provisions of the PAR employment agreements with Brian Finstead and Gerald Guzik did not impair the right of any qualified employee to choose a qualified rehabilitation consultant.

32. Minn. R. 5220.1805 (G) prohibits a rehabilitation provider from incurring profit, splitting fees, or having an ownership interest with another rehabilitation provider outside of the firm that employs the provider.

33. PAR is properly subject to regulatory discipline for entering into an agreement for "splitting fees ... with another rehabilitation provider outside of the firm that employs the provider."

34. Minn. R. 5220.1900, subp. 2, limits rehabilitation providers to billing only for "those necessary and reasonable services that are rendered in accordance with Minn. Stat. § 176.102 and the rules adopted to administer that section."

35. The provisions of the PAR employment agreements with Brian Finstead and Gerald Guzik did not oblige either PAR or Integrity Rehabilitation to bill for other than "those necessary and reasonable services that are rendered in accordance with Minn. Stat. § 176.102 and the rules adopted to administer that section."

IV. Cooperation with the Department's Investigation

36. Minn. R. 5220.1801, subp. 4, requires rehabilitation providers to respond "fully and promptly to any questions raised by the commissioner relating to the subject of the investigation, and providing copies of records, reports, logs, data, and cost information as requested by the commissioner to assist in the investigation."

37. The Department did not establish by a preponderance of the evidence that PAR failed to meet its obligations to "fully and promptly to any questions raised by the commissioner relating to the subject of the investigation," and provide copies of records as requested by the Department.

Based upon the foregoing Conclusions, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

For its failure to meet the regulatory standards set forth in Minn. R. 5220.1801, subps. 4a, 5, 8, 9(J), 9(K) and 10 and Minn. R. 5220.1805 (G).

IT IS HEREBY RECOMMENDED that the Rehabilitation Review Panel impose appropriate regulatory discipline on the Rehabilitation Firm registration, Number 5021, of Professional Associates of Rehabilitation, Inc.

Dated: April 6, 2011

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Revenue will make a final decision after a review of the record which may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations in this report. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and to present argument to the Commissioner. Parties should contact Dr. Joseph Sweere, Chairman, Rehabilitation Review Panel, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

PAR's defense to the regulatory actions is three-fold: It asserts that Mr. Richardson's service to C.J. and K.A. was separate and distinct from PAR's business activities. Additionally, it asserts that the employment agreements with Messrs. Finstead and Guzik and its conduct during the Department's investigation, conform to the regulatory requirements. Each of these defenses is addressed in turn.

I. Richardson as Agent of PAR

The Administrative Law Judge concludes that the actions of John Richardson, PAR's owner and principal manager, are properly attributable to PAR. A corporation acts through its agents and employees. It is well settled that acts of misconduct by a corporate agent, undertaken to advance the corporation's interests, are actually and substantially the acts of the corporation.[64]

In this case, the services that John Richardson undertook for C.J. and K.A. had a substantial relationship to PAR's rehabilitation business, were related to PAR's business development efforts and were undertaken with the use of PAR staff, facilities, equipment and materials. Indeed, even the attorneys who seek Richardson's services cannot readily distinguish between Mr. Richardson and PAR.[65] In Mr. Richardson's field, he and his company are considered one and the same.[66]

II. Separation of QRC and Non-QRC Functions

The regulations of Chapter 5220 oblige a strict separation between QRC-related functions and non-QRC functions. For example, Minn. R. 5220.1801, subp. 8 provides:

> The roles and functions of a claims agent and a rehabilitation provider are separate. A qualified rehabilitation consultant, qualified rehabilitation consultant intern, registered rehabilitation vendor, or an agent of a rehabilitation provider, shall engage only in those activities designated in Minnesota Statutes, section 176.102, and rules adopted thereunder.

(Emphasis added). Because of the influential role that rehabilitation providers play in guiding treatment and rehabilitation plans, the rule fulfills an important regulatory

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[64] *See, Swanson v. Domning,* 86 N.W.2d 716, 721 (Minn. 1957); *Thomas Oil, Inc. v. Onsgaard*, 215 N.W.2d 793, 796 (Minn. 1974); *accord, Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.,* 65 F.3d 1427, 1433 (8th Cir. 1995) ("[u]nder Minnesota law, it is well established 'that a principal cannot accept the benefits of the agent's unauthorized conduct and then deny liability based on the fact that the conduct was unauthorized'").

[65] *See,* Test. of R. Poehls, Vol. 3, at 39; Testimony of Michael Schultz, Vol. 3, at 18.

[66] *Id.*

objective – maintaining professional distance between rehabilitation providers and the parties to a workers compensation dispute.

The regulations impose upon the registered provider a duty to enforce the applicable boundaries. Under Minn. R. 5220.1801, subp. 9 (E), rehabilitation providers are required to "monitor the performance of services provided by a person working at the rehabilitation provider's direction."

In this case, however, the boundaries of strict separation required by the regulations were abandoned. C.J. and K.A. were shuttled between Richardson's "private practice" and his corporate practice as he found useful and convenient.[67] Completely overtaken by Mr. Richardson's interest in generating billings after the surrender of his QRC registration, PAR did not adequately "monitor the performance of services provided by a person working at [its] direction."

The settlement agreement signed by Richardson in April of 2008 does not point to a different conclusion. A fair reading of that agreement is that while Richardson was free to continue his management role over PAR, and serve as an expert witness, he pledged that PAR would "comply with Minn. Stat. § 176.102 and Minn. R. Ch. 5220."[68] That has not occurred.

Neither does the decision *In the Matter of QRC Registration of David M. Scorse* require a different result. In *Scorse*, the Workers' Compensation Court of Appeals considered "whether a QRC, when functioning as a [Disability Case Manager], is subject to the rules of professional conduct set out in the rehabilitation rules (Minn. R. 5220.1800 - 5220.1806)." The Court concluded that the regulations requiring objectivity and professional distance among QRCs did not apply when a registered QRC worked as Disability Case Manager for an employer or an insurer. The Court held:

> Employers and insurers should be able to retain QRCs to provide the disability case management services necessary to return an employee to work. Similarly, a QRC should be free to offer his or her services as a DCM to an employer and insurer. Anytime, however, a QRC becomes an employee or agent of an employer or insurer, the conduct of the QRC on behalf of his employer or principal might well violate Minn. R. 5220.1801, subp. 8. As a practical matter, if an employer or insurer hires a QRC to provide disability case management services, it seems unlikely that the QRC will not "act as an advocate for or advise any party [the employer or insurer] about a claims or entitlement issue." The very reason the employer or insurer retains a DCM is to represent its interests and accomplish its goals. We do not believe that the intent of the rule was to preclude a QRC from working as a DCM. While not argued by either

[67] Exs. 5, 6, 13, 27, 28 and 30; Ex. 126 at 46-49.

[68] Ex. 101.

> party, such a result might well violate the constitutional guarantees of equal protection and due process. We conclude, therefore, that Minn. R. 5220.1801, subp. 8, does not apply to a QRC working as a disability case manager but applies only when a QRC is providing statutory rehabilitation services.[69]

An important principle of the *Scorse* case is that when a QRC is regularly employed by a company or an insurer, it is obvious to all who has the Case Manager-QRC's loyalty. Notwithstanding the QRC registration held by the Disability Case Manager, in such a circumstance, there is not a genuine expectation that he or she will be disinterested, neutral or objective when discussing rehabilitation plans.

The holding in *Scorse* is inapposite to this case. First, John Richardson is not working as a disability claims manager for a single employer or insurer. Thus, the Court's holding does not extend to him.

PAR asks this tribunal to extend the *Scorse* holding to "disability case managers" hired by employees. While the Administrative Law Judge doubts that he has such powers, the invitation would not be accepted even if he did. Unlike the unambiguous set of loyalties held by a QRC that is employed by a single company, Richardson's professed duties and loyalties were a constantly changing, on again – off again affair. Indeed, even as to the same clients, Richardson used PAR resources for full-throated advocacy for clients on some days, and on other days, claimed to facilitate neutral assessments of their needs.[70] This blending of functions is misleading and at odds with the requirements of Chapter 5220. Regulatory discipline is appropriate in this case.

III. The Penalty Provision of the Employment Contract

PAR asserts that its employment agreements with Messrs. Finstead and Guzik did not violate the proscription of Minn. R. 5220.1805 (G) on incurring profit on the work of other providers or sharing fees with other providers. It asserts that its claim to $2,000, or 50 percent of the fees generated from the date of the separation of employment until the resolution of the client's workers compensation petition, amounts to "liquidated damages." The argument is not well taken.

Regardless of how its demand for money is phrased,[71] to the extent that PAR intended to receive revenue for work performed by Integrity Rehabilitation, LLC, it is

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[69] *In the Matter of QRC Registration of David M. Scorse,* 56 W.C.D. 18, 1996 WESTLAW 749979, Slip op. at * 28 (Minn. Work. Comp. Ct. App. 1996) (emphasis added).

[70] *See,* Findings 25 – 35 and 41 – 52; *compare also,* Test. of J. Richardson, Vol. 2 at 183 ("I have a fairly significant private practice under the umbrella of PAR, Inc., where I do work on personal injury cases; catastrophic injury cases, at times; long-term disability; not much short-term disability – but occasionally; and Social Security disability").

[71] *Brookfield Trade Ctr., Inc. v. County of Ramsey,* 584 N.W.2d 390, 394 (Minn. 1998) ("In interpreting a contract, the language is to be given its plain and ordinary meaning"); *accord, Knudsen v. Transport Leasing/Contract, Inc.,* 672 N.W.2d 221, 223 (Minn. App. 2003).

barred by the regulation. Minn. R. 5220.1805 (G) prohibits fractional shares of the billings of other providers or profiting from work that a rehabilitation provider does not perform. For this reason, regulatory discipline is appropriate.

III. Freedom to Choose a QRC

The Department asserts that the fee-sharing provisions of the PAR employment agreements likewise violate the provisions of Minn. R. 5220.0710. The Department argues that the requirement to remit either $2,000 or 50 percent of the fees to PAR makes service to its former clients so disadvantageous that Messrs. Finstead and Guzik might not make themselves available to former clients of PAR.

While this may be true, this does not amount to a violation of Minn. R. 5220.0710. The rule permits a qualified employee to freely select a willing QRC and makes special provision for those circumstances where, following selection, the QRC is unavailable.[72] The rule is not an entitlement to the services of a QRC so demanded, a guarantee that the hoped-for QRC will serve or a promise that the QRC will make money. These are all matters beyond the four corners of the regulation.

In this case, Messrs. Finstead and Guzik were fully entitled to refuse to serve the clients they met while working at PAR – for financial reasons or no reason.[73] Minn. R. 5220.0710 does not reach or regulate their selection of clients. For that reason, this regulation does not provide a basis to impose regulatory discipline upon PAR.

IV. Cooperation with the Department's Investigation

Minn. R. 5220.1806 obliges rehabilitation providers to "cooperate fully" with investigations undertaken by the Department. Under the regulation, cooperation includes responding "fully and promptly to any questions raised by the commissioner relating to the subject of the investigation, and providing copies of records ... as requested by the commissioner to assist in the investigation."

The Department argues that because two documents that it requested were belatedly provided by PAR, and another is suspected to exist, PAR did not "fully and promptly" furnish requested records. The argument is not well taken.

A sizeable cache of documents was provided to the Department in a prompt manner; and two other items, of lesser significance, arrived later. The third item – a completed "initial interview form" for K.A. – has never been established to exist.[74]

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[72] *See,* Minn. R. 5220.0710, subps. 1 and 5.

[73] *See,* Test. of G. Guzik, Vol. 2 at 158-59.

[74] *See*, Test. of P. Moosbrugger, Vol. 2 at 76-79.

These shortcomings fall short of the significant obstruction to an agency's investigation that has formed the basis for discipline in other contested cases.[75]

In the view of Administrative Law Judge, regulatory discipline is not appropriate on this ground.

E. L. L.

[75] *In the Matter of the Revocation of the Family Child Care License of Patricia Salisbury*, OAH No. 12-1800-15650-2 (2004) (Licensee failed to cooperate with the agency's investigation when she refused to permit inspection of the licensed premises) (http://www.oah.state.mn.us/aljBase/180015650.rt.htm); *In the Matter of the Indefinite Suspension of the License of Nicolette Buege*, OAH Docket No. 6-1800-15343-2 (2003) ("Ms. Buege declined to discuss the incident at that time and made no effort to discuss the incident ... before this licensing action was taken") (http://www.oah.state.mn.us/aljBase/180015343.awk.rt.htm); *In the Matter of Jodi K. Brown, L.P.N.*, OAH Docket No. 1-0904-15308-2 (2003) (The Licensee failed to submit to a set of agreed-upon evaluations) (http://www.oah.state.mn.us/aljBase/090415308.sd.htm).